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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE CEJA AGUILAR,

Defendant and Appellant.

C069672

(Super. Ct. No. CM034960)

Defendant Jorge Ceja Aguilar pleaded no contest to assault with a deadly weapon, a knife (Pen. Code, § 245, subd. (a)(1)),¹ and admitted the allegation that he personally inflicted great bodily injury on the victim (former § 12022.7, subd. (a)). The trial court sentenced defendant to an aggregate state prison term of seven years, consisting of the upper term of four years for the offense plus three years for the enhancement.

¹ Undesignated statutory references are to the Penal Code in effect at the time of defendant's October 4, 2011 sentencing, unless otherwise indicated.

Defendant contends the trial court improperly made dual use of the fact that he personally inflicted great bodily injury on the victim to impose the upper term on the offense. Acknowledging that his trial counsel did not object, he also contends he received ineffective assistance of counsel. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Stipulated Facts

The parties stipulated to the following facts when defendant entered his plea: "On April 18, 2010, the victim was walking when he was approached by a group who began following and taunting him attempting to engage the victim in a fight. The defendant and the victim then confronted each other and the [defendant] eventually pulled out a fixed-blade knife, cutting and stabbing the victim numerous times. The victim received a three[-] to four[-]inch cut on the left side of his neck, also a four[-] to five[-]inch[-]deep laceration to his left forearm, stabbing to his left arm, two to the left side of the chest, and stabbing to the left side of the abdomen. These injuries were life-threatening and did require surgery. This all occurred in Butte County in the State of California."

The Probation Report

The probation report stated:

At 2:17 a.m. on April 18, 2010, officers found the victim, Joseph Igbineweka, "bleeding profusely from his left forearm."

The officers located two Asian suspects, but two other suspects, including defendant, got away.

The victim told the officers he was walking alone when a group of people began calling him "nigger." He tried to ignore them and walk away, but two members of the group kept following him and directing racial slurs toward him. When the victim stopped to talk to an acquaintance on the street, the men who had been following the victim also stopped. One swung at the victim, who punched him. The second suspect pointed an unknown object at the victim which emitted a red laser light, then made a comment about shooting the victim; however, the victim did not see a gun. The second suspect attacked the victim and they punched each other several times. The suspects then ran from the scene. The victim realized afterward that he had been stabbed during the supposed exchange of punches.

Numerous witnesses corroborated the victim's account. Some identified detained suspect Barry Sayavong as the stabber, but others said the stabber looked Hispanic; one said the stabber had flashed gang signs before running. The police arrested Sayavong and booked him for attempted murder and "[h]ate [c]rime," but he was later released.

On October 24, 2010 (roughly six months after the crime), the police received a criminologist's report which identified DNA from blood on the knife found at the crime scene as defendant's. An arrest warrant for defendant issued.

On August 13, 2011 (well over a year after the crime, and almost nine months after the arrest warrant issued), defendant turned himself in. He said he knew he had warrants on him and was tired of "hiding."² He admitted juvenile gang activity and continuing association with gang members, but denied current gang affiliation.³

Defendant told a detective that on the night of the crime he went out with friends, carrying a folding knife for protection because of "'a lot of crazy gang stuff.'" At a party, he consumed alcohol and cocaine. A Hispanic male stranger greeted him by a street name, claimed a mutual acquaintance, and followed him around. When defendant left the party by himself, the Hispanic male joined him and walked along with him, but got 10 feet ahead of him at some point. A tall Black male (the victim) was walking ahead of the Hispanic male, who made derogatory comments about the way the victim was walking. Defendant said he did not want trouble and disapproved of the Hispanic male's remarks. The victim turned, faced the Hispanic male, and then said to one of a group of people at the scene, "'Hey[,] Mike, you got my back?'" Someone responded,

² Defendant had outstanding warrants for possession of marijuana and possession of alcohol by a minor. These matters were dismissed with a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) when defendant pleaded to the assault charge.

³ At the time of the offense, defendant was 19.

"'Yes, President[,] I got your back.'"⁴ The victim punched the Hispanic male in the face. Defendant walked away. The victim pursued him and punched him over and over in the face and head. Defendant unsuccessfully tried to fight back, but fell. He then pulled out the folding knife, stood up, and began "slashing" at the victim, cutting his own left thumb in the process; he did not thrust the knife in a stabbing motion and did not intend to kill the victim. The victim stopped his attack and left. Defendant dropped the knife in an alley and walked home.⁵

The next day, defendant's brother, having seen the news, said, "'You just stabbed the fucking President!'" He told defendant the victim's wounds were serious and an Asian male was "'facing life in prison'" for a hate crime. Defendant left town. Thereafter he traveled to and from Chico, but finally grew tired of hiding and being away from his family. After discussing the matter with them, he turned himself in.

Offered the chance to write an apology letter to the victim, defendant did so.

Defendant told the probation officer a similar story about the offense, but denied that he was carrying the knife for protection that night. He said a friend gave him the knife, which was broken.

⁴ According to the victim's statement to the probation officer, at the time of the offense he was the student body president of his college.

⁵ Shown the knife, defendant admitted it was his.

Defendant believed he was innocent of the crime charged "to a certain extent"; nevertheless, he wanted to extend the victim his "humblest apologies." He did not intend to commit attempted murder or a hate crime. He was not "talking racial stuff"; it was "the other guy" who did that. He was scared and did not want to get into a fight, but realized the victim thought he was a threat. The victim "knows what he did. He attacked me but I forgive him." Defendant considered himself "a good kid; a bad person would've done worse to him." He was not "on the run" after the crime, but was "trying to save my life and money for an attorney." He wished he had turned himself in earlier, "but it wasn't what my family wanted." Defendant was humble and had "bad remorse." He had completed Rite of Passage, a military-style gang rehabilitation program, and had "a daughter and a fiancé[e]."⁶

After noting that defendant was statutorily ineligible for probation unless the trial court found this was an unusual case (Cal. Rules of Court, rule 4.413),⁷ the probation officer opined that it was not: "The defendant has engaged in violent conduct that indicates a serious danger to society. The victim was a stranger The defendant engaged in a physical altercation with the victim. He then used a knife to inflict

⁶ The record contains copies of defendant's apology letter to the victim and his written statement to the probation officer, but they did not copy well and are largely unreadable.

⁷ Further rule references are to the California Rules of Court.

significant injury to the victim consisting of serious lacerations which required surgery. The defendant has numerous prior adjudications as a juvenile for fighting. His prior performance on juvenile probation was unsatisfactory."

Furthermore, defendant would not be a suitable candidate for probation (rule 4.414) because he "was an active participant in the crime The defendant was armed with a knife and used it to inflict serious physical injury to the victim. Although the crime before the Court is the defendant's first felony conviction, the defendant is not a stranger to the criminal justice system. The defendant's juvenile criminal record indicates a pattern of regular and serious criminal conduct. He sustained 10 juvenile adjudications and numerous violations of probation. His performance on juvenile probation was unsatisfactory, ultimately leading to out of home placement in Rite of Passage. [¶] The defendant expressed remorse for inflicting serious injury to the victim; however, it appears he does not fully acknowledge his responsibility in inflicting the injuries. The defendant stated he believes he is 'innocent to a certain extent' as his companion made the racial comments and the victim started the physical altercation. Even though the defendant turned himself in to law enforcement, it was approximately 1.5 years after he committed the crime."

Under rule 4.421, factors in aggravation included defendant's numerous and serious juvenile adjudications; his unsatisfactory prior performance on juvenile probation; his

being armed with a weapon and using it in the commission of the crime; and his infliction of serious injury on the victim while using the weapon. Under rule 4.423, no factors in mitigation existed. Therefore, the upper term was recommended.

Sentencing

Defense counsel requested the middle term, citing defendant's youth, lack of prior felony convictions, and admission of culpability "at an early phase." Defendant's fiancée spoke on his behalf.

In rebuttal, the prosecutor asserted that defendant's conduct showed he posed a great threat to society. Furthermore, his "early" admission of culpability came almost a year and a half after the crime and was less than forthright.

The victim made a statement denying that he had provoked defendant and opining that defendant intended to kill him.

After rejecting probation, the trial court explained why it would impose the upper term:

"The Court reviewed the criteria affecting the term under [California] Rules of Court[, rules] 4.421 and 4.423. The Court notes that . . . the crime involved great violence and callousness. The reports describe that one of the knife wounds went across the victim's throat. There is—resulting in significant injury to the victim through the placement of the knife wounds and the number of the wounds. The victim was particularly vulnerable in that he did not know that the defendant had a knife and this was a stranger attack so there

was no reason for the victim to know that he was about to be attacked. It does seem that there was another individual involved there that night; however, the defendant occupied a position of leadership. Also, the defendant has engaged in violent conduct that indicates serious danger to society in review of his juvenile history. Also, . . . the sustained juvenile petitions show a pattern of increasing serious conduct and the performance on wardship was unsatisfactory.

"The Court did review the factors in mitigation and takes into consideration those raised by [defense counsel], those being the defendant's age. Also, the lack of an adult record, the letter of apology offered by [defendant], and . . . therein the admission to wrongdoing. The Court was mindful, though, as argued by the District Attorney, and detailed in the probation report, that [defendant] did not immediately turn himself in, did so after the warrant was issued. And in those admissions of responsibility has still shifted blame over to the victim, and the apology and responsibilities carried with [sic] qualifications that were—in [defendant's] mind are—meaningful. The Court then—in recognizing those factors in mitigation—finds that they are insufficient to draw a middle term and will find that the appropriate term is the aggravated term of four years in state prison."

The trial court then added the three-year enhancement for personally inflicting great bodily injury, yielding a total term of seven years.

DISCUSSION

Defendant contends the trial court erred "by basing its decision to impose the upper term on the fact that [defendant] inflicted great bodily injury during the assault, a fact already used to impose an additional three years in prison under [former] . . . section 12022.7, subdivision (a)." As we shall explain, even if defendant was correct, he could not win reversal because the court cited numerous additional valid grounds for the upper term.

"When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (§ 1170, former subd. (b) [the section in effect at the time of defendant's crime on April 18, 2010].)

In exercising its discretion under section 1170, former subdivision (b), the trial court "may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." (Rule 4.420(b).) However, the court may not use a fact charged and found as an enhancement as a reason for imposing the upper term, unless the court has discretion to strike the enhancement and does so. (Rule 4.420(c).)

"Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations] We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.'" (*People v. Avalos* (1996))

47 Cal.App.4th 1569, 1582.) A single valid aggravating factor is sufficient to justify the upper term. (*People v. Steele* (2000) 83 Cal.App.4th 212, 226 (*Steele*).)

Defendant asserts that the trial court violated the dual-use ban of rule 4.420(c) when it relied on the "great violence" of the assault and the "significant injury to the victim through the placement of the knife wounds and the number of the wounds," because this fact was encompassed by the enhancement for personally inflicting great bodily injury on the victim, on which the court also sentenced defendant. However, defendant omits part of the court's finding on this factor.

As noted above, the trial court found that the crime showed not only "great violence" but also "callousness." Rule 4.421(a)(1) states as a factor in aggravation that "[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." The term "callousness" shows that the court was relying on this aggravating factor, which adds a dimension beyond the mere infliction of great bodily injury. Furthermore, as the court observed, the nature and extent of the victim's wounds, especially the one that went across the victim's throat, graphically revealed defendant's callousness in the commission of the offense. Thus, the court's finding on this factor was not an improper dual use of facts.

In any event, the trial court also cited other aggravating factors: the victim's particular vulnerability (rule

4.421(a)(3)), defendant's position of leadership in the commission of the offense (rule 4.421(a)(4)), his engaging in violent conduct that indicated a serious danger to society (rule 4.421(b)(1)), his pattern of increasingly serious conduct as a juvenile (rule 4.421(b)(2)), and his prior unsatisfactory performance on juvenile probation (rule 4.421(b)(5)). Any of these, if valid, would justify the upper term. (*Steele, supra*, 83 Cal.App.4th at p. 226.) Defendant makes no attempt to explain why any of them would not be valid.⁸ It appears to us that all (with the possible exception of the first) are unequivocally supported by the evidence. Thus, even assuming arguendo the court's first aggravating factor entailed an improper dual use of facts, the additional aggravating factors the court cited justified its sentencing choice. (*Steele*, at p. 226.)

In light of the above, defendant's backup claim of ineffective assistance of counsel fails. Counsel made the best effort possible under the circumstances to raise mitigating factors, but he could not have contested most of the aggravating

⁸ Defendant does not mention these aggravating factors when making his dual-use-of-facts argument. He alludes to them only in passing under the heading "Prejudice," which is improper because this heading does not signal that these aggravating factors will be discussed thereunder. (Rule 8.204(a)(1)(B); *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1346.) But even there, he does not dispute the validity of these factors. He only asserts baldly that they were less significant to the court's sentencing decision than the factor he disputes—which, even if supported by the record, would be immaterial.

factors the trial court cited. Thus, even if he had successfully objected to the aggravating factor defendant now attacks, he could not have obtained a better outcome for defendant. (See *People v. Coleman* (1989) 48 Cal.3d 112, 166.)

DISPOSITION

The judgment is affirmed.

_____, BUTZ, J.

We concur:

_____, BLEASE, Acting P. J.

_____, NICHOLSON, J.